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No. 587

In the Supreme Court of the United States

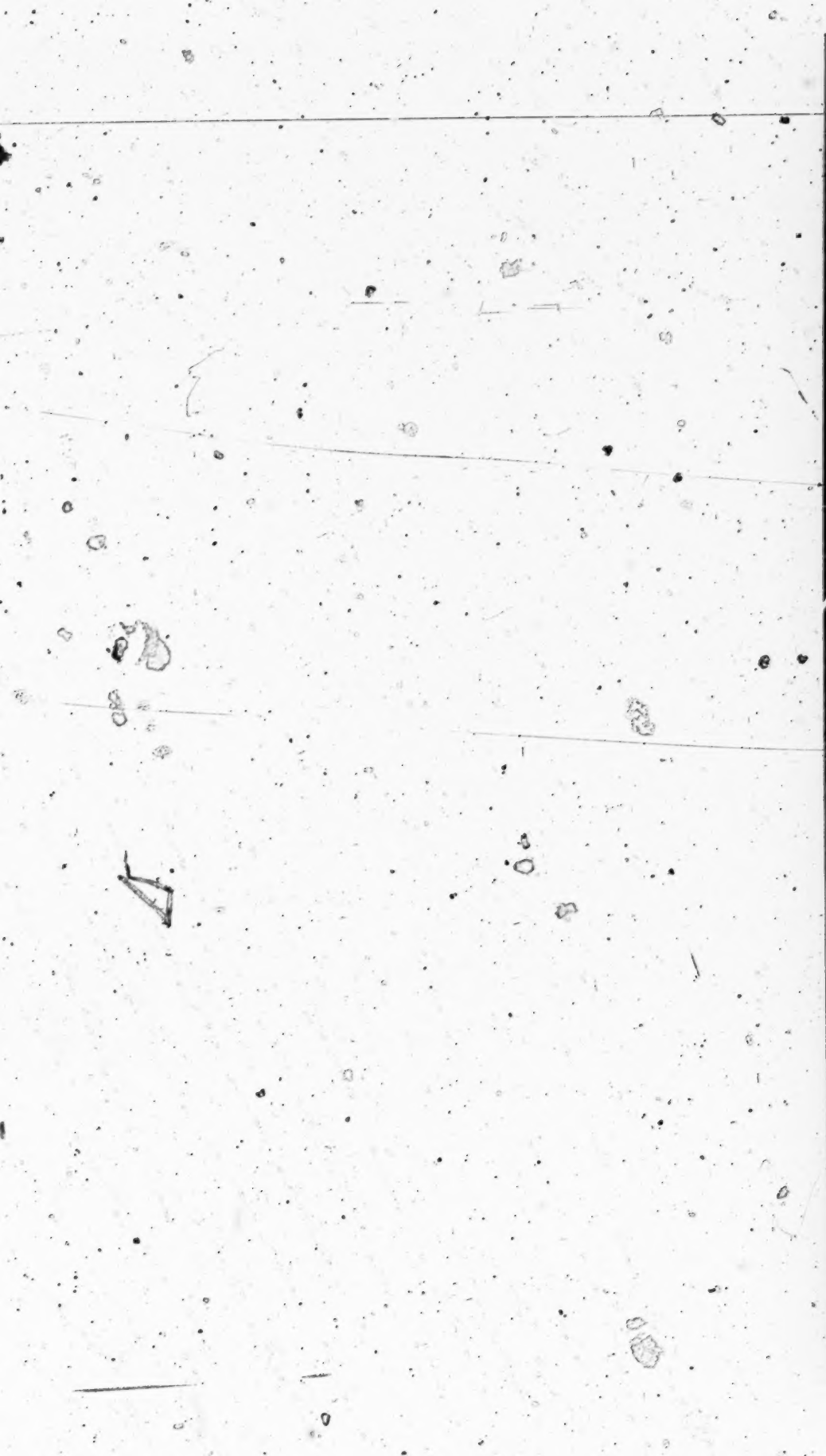
OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

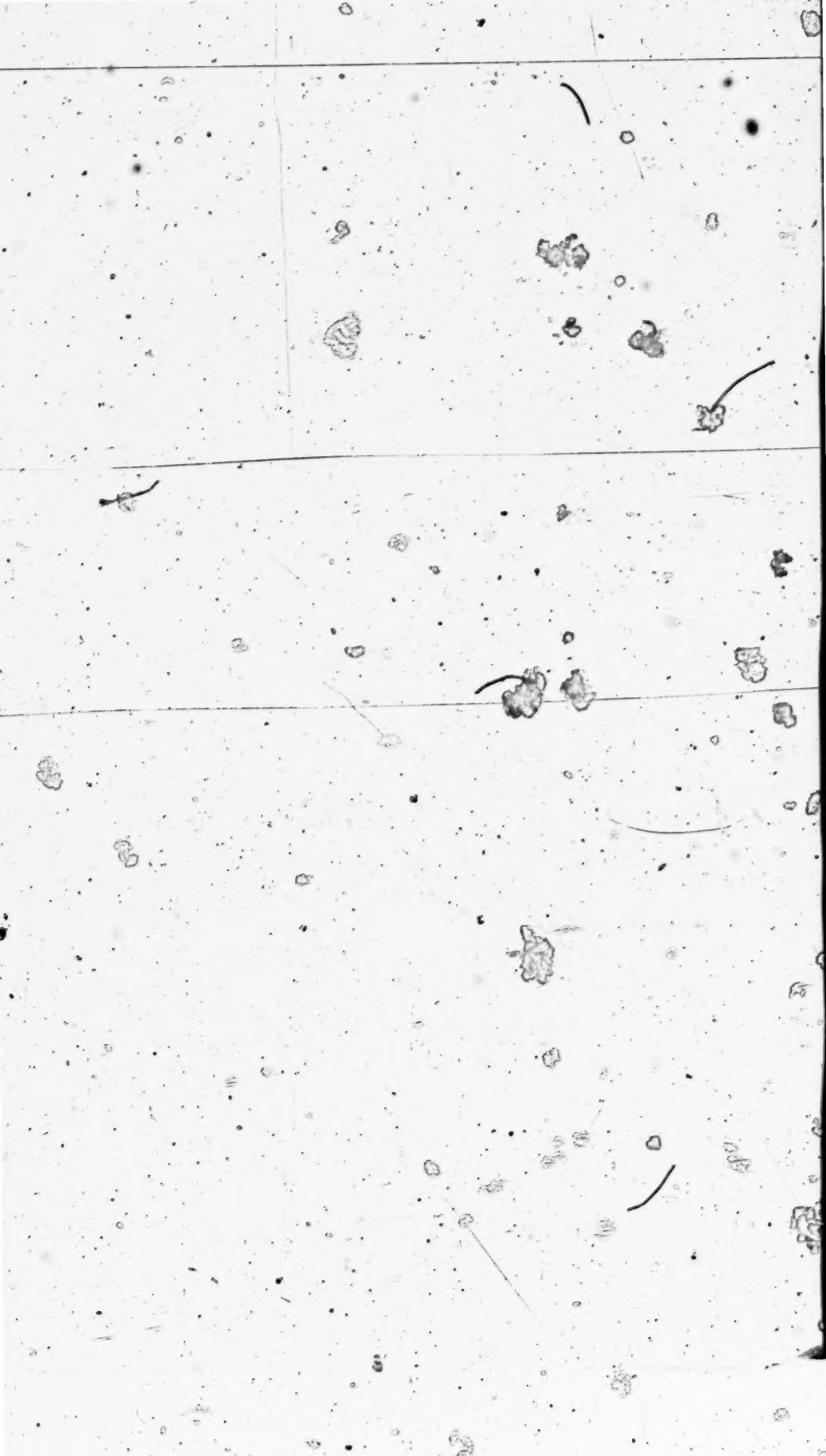


INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
The Hetch Hetchy project	4
Operation under the contract of July 1, 1925	6
The position of the Secretary of the Interior	7
Specification of errors to be urged	7
Reasons for granting the writ	8
(1) The terms of the statute	8
(2) The legislative history of the statute	10
(3) The importance of the issue	13

CITATIONS

Cases:	
Borland v. *Nevada Bank*, 99 Cal. 89, 33 Pac. 737	9
Camfield v. *United States*, 167 U. S. 518	13
Cole v. *Laird*, 121 Iowa 146, 96 N. W. 744	9
Dresser v. *Zabriskie*, 39 Atl. 1066 (N. J. Ch.)	9
Federal Trade Comm. v. *Raladam Co.*, 283 U. S. 643	11
Galloway v. *Chatham R. R. Co.*, 63 N. C. 147	9
Humphrey's Executor v. *United States*, 295 U. S. 602	11
Mansfield v. *District etc. Assoc.*, 154 Cal. 145, 97 Pac. 150	9
Oregon & Cal. R. R. v. *United States*, 238 U. S. 393	13
Reichelderfer v. *Quinn*, 287 U. S. 315	13
Ruddy v. *Rossi*, 248 U. S. 104	13
Smith v. *Burnet*, 35 N. J. Eq. 314	9
Speigle v. *Meredith*, 22 Fed. Cas. No. 13227	9
Standard Ins. Co. v. *United States*, 302 U. S. 442	13
State v. *Bove*, 98 N. J. L. 350, 116 Atl. 766	9
Stephenson v. *Binford*, 287 U. S. 251	13
Utah Power & Light Co. v. *United States*, 243 U. S. 389	13
Constitution and Statute:	
U. S. Const., Art. IV, sec. 3, cl. 2	13
Raker Act of December 19, 1913, c. 4, 38 Stat. 242	3
Miscellaneous:	
50 Cong. Rec. 3905, 3996, 3997, 3999, 4093, 4097, 4099, 4110, 5473	12
51 Cong. Rec. 6–7, 132, 136, 182, 273, 343, 344–345	11, 12
H. Rept. No. 41, 63d Cong., 1st sess., 1913, pp. 11, 16, 25, 43	10, 14



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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on September 13, 1939, reversing the decree of the United States District Court for the Northern District of California.

OPINIONS BELOW

The opinion of the trial court (R. 90–125) is reported in 23 F. Supp. 40. The opinion of the circuit court of appeals (R. 661–677) is reported in 106 F. 2d 569.

JURISDICTION

The decree of the circuit court of appeals was entered on September 13, 1939 (R. 678). The jurisdiction of this court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

By the Raker Act of December 19, 1913, the United States granted lands and rights-of-way to the City and County of San Francisco for the construction of a water supply and power project but prohibited the "selling or letting" to any private corporation of "the right to sell or sublet" energy generated through the use of the lands granted. Thereafter the City entered into an agreement with a private corporation for the disposition of such energy by the corporation. Under the agreement the company bears the risk of loss of energy delivered to it for transmission and sale and is obligated to pay the City on a fixed date each month, and at a price fixed without regard to the price the company receives from consumers, for all energy delivered or available for delivery under the contract.

The questions are:

1. Whether the agreement is prohibited even if its effect is to grant to the company the right to sell energy only as agent for the City;

2. Whether, assuming that the Act prohibits only the sale of energy for resale, the agreement provides for such a sale or merely grants the right to sell energy as agent for the City.[1]

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[1] In this petition, the argument will be confined to the first and broader question whether the agreement falls within the prohibition of the Raker Act regardless of the interpretation placed upon the contract. However, if certiorari is granted, the Government will also contend that the agreement provides for sale of the energy to the company for resale, rather than for its sale by the company as agent for the City.

STATUTE INVOLVED

The Raker Act of December 19, 1913, c. 4, 38 Stat. 242, is printed as an exhibit (R. 12–36, 192–216). The pertinent part of Section 6 provides:

> That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: * * *

STATEMENT

On April 27, 1937, the United States brought this suit in the Northern District of California to enjoin the City and County of San Francisco (hereinafter called the City) from disposing of electric energy to the Pacific Gas and Electric Company (hereinafter called the Company) under a contract asserted to be in violation of Section 6 of the Raker Act of December 19, 1913, 38 Stat. 242 (R. 2–12).

The City in its answer (R. 41) denied violation of the Act, alleging that the energy is distributed by the company as agent for the City (R. 48).

The district court concluded that the contract disposes of the right to sell energy in violation of Section 6 of the Act (R. 166–167) and entered a decree enjoining the City from disposing of energy under the contract or in any other manner whereby the right to sell or sublet such energy is vested in any individual or corporation other than a municipality (R. 168–170). The circuit court of appeals, with two judges participating, held that the contract is one of agency rather than

sale (R. 661–677), and reversed on the ground that the Act does not prohibit the sale of energy by the Company as agent for the City.

In brief, the facts are as follows:

The Hetch Hetchy project.—Congress passed the Raker Act on December 19, 1913 to permit the use of public lands by the City for a water-supply and hydroelectric project. The Act grants lands in Yosemite National Park and in the Stanislaus National Forest for the City's Hetch Hetchy project, which consists of reservoirs, dams, powerhouses, and other structures essential to water and electric plants. The Act also grants rights-of-way for water conduits, power lines, roads, and communication lines in the Park and Forest and in the public lands along the route between the Hetch Hetchy reservoir and Newark, California (Sec. 1).

By Section 9 the grant is made subject to the City's observance of all the conditions of the Act. Among these conditions is the provision (Sec. 9 (m)) that the grantee—

> shall develop and use hydroelectric power for the use of its people and * * * sell or supply such power for irrigation, pumping, or other beneficial use * * *.

Any excess remaining after satisfaction of specified public uses may be disposed of for private consumption (Sec. 9 (l)).

Section 6, here sought to be enforced, provides:

> That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet

> the water or the electric energy sold or given to it or him by the said grantee: * * *

The grant with "all the terms and conditions therein contained" was accepted by the City on January 13, 1914 (R. 217–220). By 1925 the City had completed both its main power plant at Moccasin Creek, which utilizes water from the Hetch Hetchy reservoir, and a transmission line from the plant to Newark, about 40 miles southeast of San Francisco (R. 281–282, 307–308).

Thereupon, it entered into the contract with the Pacific Gas and Electric Company which inaugurated the arrangement here in question (R. 76–90). The contract provides for the delivery of the entire energy output of the Moccasin Plant to the Company at Newark at not to exceed a 75-percent monthly load factor.[2] The Company agrees to furnish all necessary peak load and steam stand-by services, to collect the charges, and to "make accounting to" the City each month for 76 percent of the energy delivered to it at a rate of 26.935 percent of 2.383 cents per kilowatt-hour.[3] The Company is to retain the remaining 73.065 percent as its "compensation for services rendered" (R. 80–81, 83). Upon the failure of the Company to take all of the energy available under the contract, the monthly payment to be made to the City is to be computed on the

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[2] Load factor is the ratio between the average load and the maximum load capacity of the plant (R. 299).

[3] The contract recites that the average transmission and distribution losses of energy from the Newark substation to consumers in San Francisco is 24 percent, and that 2.383 cents is the average revenue per kilowatt-hour received by the Company in San Francisco in 1924 (R. 79–80, 82–83).

basis of the amount of energy which the City could have delivered (R. 84–85).

Operation under the contract of July 1, 1923.—The lands granted by the United States are now being used in connection with the project (R. 6, 43–44, 281). All of the energy delivered by the City at Newark is generated with water stored on, and conducted over, such lands, and the energy itself is transmitted over such lands (R. 280–282, 307–308, 411, 428).[4] The power passes from the lines of the City to those of the Company at Newark, where it merges with energy from other sources in the Company's power pool. The City's compensation is measured by the Newark meter readings (R. 283–285, 291, 305). The rate of generation and the output of the City's Moccasin plant is controlled exclusively by the system load dispatcher, who is an employee of the Company alone (R. 282–284, 302). Through him its control is integrated with the control of other plants owned by the Company.

Bills to customers are issued under the name of the Company and do not indicate that the Hetch Hetchy plants are the source of the power (R. 285). The City itself is a customer-consumer of energy for its municipal railways, street lights, and public buildings, and is billed by the Company at the same rates as those

[4] Since 1935 the output of the Early Intake plant built in 1918 to supply power for construction of the project (R. 407) and using water from Lake Eleanor Reservoir in Yosemite Park (R. 282) has been diverted into the transmission lines from the Moccasin plant to San Francisco (R. 411, 428). In the trial court's findings (R. 161) and throughout this petition energy generated at both the Moccasin and Early Intake plants is referred to as originating at Hetch Hetchy.

charged other consumers, without regard to the volume or price of the Hetch Hetchy energy delivered to the Company at Newark (R. 285–286, 293).

The position of the Secretary of the Interior.[5]—In August 1925 Secretary Work twice declined to rule on the validity of the contract, stating that the matter should be determined at some later date after operation (R. 339–340, 356–357). On November 8, 1930, Secretary Wilbur by memorandum to the Mayor of the City stated that indefinite continuance of the contract could not be permitted (R. 238–239). A month later, in a letter to the City Attorney, he referred to the "City's three-year program for compliance with the provisions of the Raker Act respecting power distribution" and asked to be advised of completion (R. 322–323).

After a public hearing in May 1935 (R. 224–226, 228–229, 233) Secretary Ickes concluded that the contract was in violation of the Raker Act (R. 230–269), and on April 2, 1937, he requested the Attorney General to bring this suit (R. 274–279).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that Section 6 of the Raker Act does not prohibit the granting to private corporations of the

[5] In 1923 Solicitor Edwards of the Department of the Interior ruled that Section 6 of the Act prohibited sale for resale of surplus energy from the Early Intake plant (R. 346), and, relying on its legislative history (R. 347–351), asserted that the Act clearly contemplates public ownership, sale, and distribution (R. 346). However, he suggested the feasibility of an agreement for *transmission* of the City's power over privately owned lines (R. 234, 353–354).

right to sell electric energy originating at Hetch Hetchy as agent for the City.

(2) In failing to hold that the contract of July 1, 1925, between the City and the Company is a contract to sell energy for resale, prohibited by Section 6 of the Raker Act.*

REASONS FOR GRANTING THE WRIT

In holding that Section 6 of the Raker Act does not prohibit this agreement, by which the City grants to a private corporation the right to sell energy generated at Hetch Hetchy, the court below has passed upon an important question of federal law which has not been but should be settled by this Court.

Section 6 of the Act prohibits the City "from ever selling or letting" to any private corporation or individual "the right to sell or sublet" water or electric energy generated on the Hetch Hetchy project. We submit that that section, by its terms, expresses a broad policy, unqualified by any exemption, to prevent energy from the Hetch Hetchy project from being sold by private parties in any capacity, and leaves no room for any exception under which the City may grant to a private corporation, for a consideration, the right to sell such energy as its agent.

(1) *The terms of the statute.*—The terms of the statute are plain. The "selling" prohibited is not the selling of energy for resale, but the selling of the right to sell energy. Once this is clear, there would seem to be

* The second of these specified errors is not urged as a reason for granting the writ of certiorari, but is reserved for argument on the merits.

no question that the prohibition applies to any arrangement whereby, for a consideration, the City grants to a private corporation any right to sell, in any capacity, energy made available to it from Hetch Hetchy. Plainly, the "selling" prohibited includes any such grant, even though the legal title to the energy does not pass through the company, and even though the consideration, like that in this case, is the assumption of an obligation to furnish peak load and steam stand-by services (R. 81) and to accept and pay for a fixed minimum of energy each month (R. 84–85) rather than a less complicated price per unit of energy sold. See *Speigle* v. *Meredith*, 22 Fed. Cas. No. 13227, at p. 911 (C. C. Ind. 1868); *Borland* v. *Nevada Bank*, 99 Cal. 89, 93, 33 Pac. 737 (1893); *Cole* v. *Laird*, 121 Iowa 146, 149, 96 N. W. 744 (1903); *Mansfield* v. *District etc. Assoc.*, 154 Cal. 145, 147–148, 97 Pac. 150, 151 (1908).

The prohibition applies to electric energy "given" to private corporations as well as to energy "sold." This phrase "sold or given" covers every means by which electric energy is, or can be delivered, furnished, or supplied to a private corporation. Obviously "given" was not used with the idea that the City would make free donations of power to private corporations. To construe it as synonymous with "sold" would deprive it of meaning altogether. Plainly, it refers to the mere transfer of possession. See *Galloway* v. *Chatham R. R. Co.*, 63 N. C. 147, 154 (1869); *Smith* v. *Burnet*, 35 N. J. Eq. 314, 324 (1882); *Dresser* v. *Zabriskie*, 39 Atl. 1066, 1067 (N. J. Ch. 1898); *State* v. *Bove*, 98 N. J. L. 350, 353, 116 Atl. 766, 768 (1922).

The City's contention that, although Section 6 forbids the sale of energy for resale (R. 676), it does not prohibit the granting of the right to sell energy as agent, seeks to make the issue turn solely upon the question whether legal title to the energy passes through the Company. In view of the policy evident from the terms of the Act we believe that any question relating to the title to the energy is wholly irrelevant. The plain purpose of Section 6 is to keep the selling of the energy out of the control of private agencies and in the hands of public agencies exclusively. The City has sold to the Company a right to make such sales. We submit that the selling of that right is plainly prohibited by the terms of Section 6 of the Act, regardless of where the title to the energy lies.

(2) *The legislative history of the statute.*—An examination of the legislative history of Section 6 confirms the view that the intention of Congress in enacting Section 6 was to prevent all selling by private agencies of electric energy from the Hetch Hetchy project.

The report on the bill by the House Committee on Public Lands states that the provision is designed to prevent any monopoly or private corporation from obtaining control of the water supply of San Francisco.[7] H. Rept. 41, 63d Cong., 1st sess., 1913, p. 11.

The Congressional debates show that there was common agreement that the purpose of Section 6 was to prevent perpetuation of the monopoly enjoyed by the

[7] Since Section 6 prohibits in identical terms the selling of the right to sell water and electric energy, it is plain that the purpose expressed in the report is equally applicable to both water and electric energy.

Pacific Gas and Electric Company and its associates (R. 265) and to make certain that the power generated through the use of the lands granted would be sold directly to consumers by the City. Compare *Federal Trade Comm.* v. *Raladam Co.*, 283 U. S. 643, 650; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 625.

Senator Norris, a member of the Senate Public Lands Committee which reported the bill, stated in debate (51 Cong. Rec. 343, Dec. 6, 1913):

> This bill is not giving to a private corporation any power. It is giving to the people of the locality of San Francisco the right to use a cheap power when it is developed. * * * Here is an instance where we are going to give it directly to the people, if we pass this bill. It is going to come into competition with power companies and corporations that have, or will have, if this bill is defeated, almost a monopoly not only in San Francisco but throughout the greater portion of California.

After reading from a report of the Bureau of Corporations dated March 14, 1912, showing a virtual electric power monopoly in the Pacific Gas and Electric Company, and associated companies (see R. 265), he said that the bill (51 Cong. Rec. 344–345)—

> if passed, will bring into competition with them one of the greatest units for the development of power that has ever been developed in the history of the world. It means competition. * * * if the power of the Hetch Hetchy is developed it will come into direct competition

with what a sworn official of the Government says is a monopolistic control of the hydro-electric power of California.

Senator Pittman, one of the bill's sponsors, declared: "It provides absolutely that neither this water nor this power can ever fall into the hands of a monopoly," and indicated that it would aid in relieving the people of the area which it would serve "from the monopoly that has been supplying them with light and power in that section of the country for years" (50 Cong. Rec. 5473).

The following colloquy indicates the interpretation of the bill by its author, Representative Raker of San Francisco (50 Cong. Rec. 3905):

> Mr. SUMNERS. Is it the purpose of this bill to have San Francisco supply electric power and water to its own people?
>
> Mr. RAKER. Yes.

Other statements throughout the debate[*] indicate consistent agreement upon the purpose to provide that the energy should be sold exclusively by the City, directly to consumers, and to make certain by that provision that it would not only be kept out of the control of private agencies, particularly the Pacific Gas and Electric Company and its associated companies, but would be placed in competition with the service rendered by those companies.

[*] See especially remarks of Rep. Ferris, Chairman of the House Lands Committee in charge of the bill, 50 Cong. Rec. 4093; Rep. Thomson, member of the same committee, 50 Cong. Rec. 3999, 4097; see also 50 Cong. Rec., pp. 3996, 3997, 4099, 4110; 51 Cong. Rec. pp. 6–7, 132, 136, 182, 273.

To make this purpose effective Congress used the peculiar language of Section 6—forbidding the "selling" of "the right to sell" energy. That language is precisely adapted to the purpose of forestalling monopoly which, by definition, imports exclusive control of the market, or of the right or ability to sell.

In granting to the Pacific Gas and Electric Company the right to sell the energy, the City has sought to circumvent this purpose. To sustain its action, it urges a strained construction of the Act. Plainly, the terms of the Act and its legislative history require, instead, a construction which will carry out its evident public object.[9] *Standard Ins. Co.* v. *United States*, 302 U. S. 442, 444; *Reichelderfer* v. *Quinn*, 287 U. S. 315, 321.

(3) *The importance of the issue.*—The legislative and administrative policy of the Federal Government has always been to preserve the national parks inviolate from private commercial exploitation. In this case Congress, in granting rights to use lands in the national parks for the production of power, determined that this policy could best be attained by preventing private agencies from acquiring any right to sell energy produced through the granted use of the public lands. The decision below permits the respondent and the Pacific Gas and Electric Company to make effective a different

[9] The statute is clearly within the power of Congress to make rules and regulations respecting the lands of the United States and contracts contemplating their use. Const., Art. IV, sec. 3, cl. 2. *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 423–424; *Camfield* v. *United States*, 167 U. S. 518, 525, 526; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404, 405; *Ruddy* v. *Rossi*, 248 U. S. 104, 107; *Stephenson* v. *Binford*, 287 U. S. 251, 274, 275.

policy of their own choosing. This they have done through a contract based upon a construction of the Act which is hypertechnical at best, and which we believe to be clearly erroneous. Whether local and private interests may thus frustrate a plainly expressed Congressional purpose to protect the use of national parks against private exploitation is, intrinsically, an issue of great general importance.

Furthermore, the purpose of Congress to bring energy from the Hetch Hetchy project into direct competition with power supplied by private utilities was intended for the benefit not only of the people of the City and County of San Francisco but of all people in the San Francisco area.[10] The effectuation of that purpose has been thus far successfully prevented. The effect of its ultimate success or defeat on rates for electric energy will be of direct concern to the entire population of that area.

Wherefore it is respectfully submitted that this petition for writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

DECEMBER 1939.

[10] See Section 8 of the Act (H. Rept. No. 41, 63d Cong., 1st sess., pp. 11, 16, 25, 43).

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